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No. 91-85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ADAM SPARKS,

Petitioner,

v.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent,

CITY AND COUNTY OF SAN FRANCISCO,

Real Party in Interest.

REPLY TO BRIEF IN OPPOSITION

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October 14, 1991

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INTRODUCTION

Adam Sparks submits this brief in reply to the City of San Francisco's opposition to his Petition for Certiorari. As demonstrated below, the City misapprehends both the nature of this Court's jurisdiction, and the nature of the constitutional

issues presented. This Court should grant certiorari to resolve the issues of broad public importance posed by both Sparks' facial constitutional challenge to San Francisco's Residential Hotel Ordinance and his demand for jury trial.

ARGUMENT

I. THE RULE OF *WALKER V. BIRMINGHAM* IS IRRELEVANT TO THE ISSUES BEFORE THIS COURT

Real Party in Interest, City and County of San Francisco ("the City"), devotes considerable attention to the case of *Walker v. Birmingham*, 388 U.S. 307 (1967), and related precedents. Yet the rule enunciated in *Walker* is not relevant to any issue posed by Sparks' Petition for Certiorari.

Petitioner Sparks here requests that this Court review the judgement and opinion of the California Court of Appeal for the First Appellate District, insofar as it affirms his conviction of six counts of contempt. In that opinion, the California Court of Appeal expressly states, that under California law, Sparks is entitled to reversal of his contempt conviction if the Residential Hotel Ordinance is facially unconstitutional. Only because the California Court of Appeal believed the Residential Hotel Ordinance to be facially constitutional, did it affirm Sparks' conviction:

> [Petitioners] focus on the constitutionality of the ordinance. California permits attack on contempt orders based on purported violation of statutes or prior orders that are unconstitutional on their face. (See *In Re Misener* (1985) 38 Cal.3d 543 [statute];

> *In Re Berry* (1968) 68 Cal.2d 137, 147-148 [court order].) Although petitioners do not press such an attack against the injunction, they do contend that the ordinance fails the test of constitutionality. Petitioners are incorrect.

(See January 22, 1991 opinion of California Court of Appeal, Appendix to Petition for Writ of Certiorari at 6a)

Should this Court grant certiorari, it will review the constitutionality of San Francisco's Residential Hotel Ordinance, but not the principle of state law embodied in California's *Berry* rule. (See *Albertson v. Millard*, 345 U.S. 242 (1953), holding state court constructions of state law to be dispositive.) In the event that this Court held the Residential Hotel Ordinance to be facially violative of the United States Constitution, the state court, on remand, would apply California's *Berry* rule to vacate Sparks' conviction. Thus, the rule of *Walker v. Birmingham*, whatever its application may or may not be in the context of federal habeas proceedings,[1] is irrelevant to direct review in this Court.

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[1] The City errs not only in contending that *Walker v. Birmingham* has some bearing upon this Petition, but also in misinterpreting *Walker*. *Walker* is a federalism case. The *Walker* Court did not create a universal federal rule applicable to all contemnors, and impose it upon the state of Alabama. Rather, the *Walker* Court held that Alabama's rule's did not contravene the federal constitution, that petitioners had notice of the Alabama rule, and that Alabama was entitled to enforce its rule against petitioners. (See *Walker v. Birmingham*, 388 U.S. at 315, 319-320) Obviously, California's *Berry* rule is entitled to the same deference as the contrary rule adopted by the state of Alabama.

II. PETITIONER WAS NEITHER REQUIRED NOR PERMITTED TO PETITION THIS COURT FOR REVIEW OF THE ORDER GRANTING A PRELIMINARY INJUNCTION

The City next contends that certiorari should be denied because Sparks failed to petition this Court for review of the order granting a preliminary injunction against him. Sparks appealed the preliminary injunction to the California Court of Appeal, and sought review of that court's decision in the California Supreme Court, because California procedural rules authorize interlocutory review of an order granting a preliminary injunction. Sparks did not seek review of the preliminary injunction in this Court, because preliminary injunctions are not final judgments, qualifying for United States Supreme Court review. (See *United States v. Quail*, 303 U.S. 621 (1938); *Musser v. Shephard*, 299 U.S. 513 (1936)) The order convicting Sparks of six counts of contempt, by contrast, is a final judgement qualifying for United States Supreme Court review. (See *In Re Roche*, 448 U.S. 1312 (1980); *N.A.A.C.P. v. Williams*, 359 U.S. 1317 (1959)) Sparks accordingly petitions this Court for review of the final judgement convicting him of six counts of contempt.

III. THE CITY MAY NOT RELY ON ITS OWN PROCEDURAL BUNGLING TO SHIELD ITS FACIALLY UNCONSTITUTIONAL ORDINANCE FROM SUPREME COURT REVIEW

In a third and final effort to erect procedural barriers to Supreme Court review, the City argues that review should be denied because each of Sparks' six counts of contempt was for violating the posting, record-keeping, and inspection

requirements of the Residential Hotel Ordinance, and none of the convictions was for renting rooms to tourists. As explained in the California Court of Appeal's opinion, Sparks was originally charged with 210 counts of contempt, virtually all of which involved renting residential rooms to tourists. The California Court of Appeal annulled all of the counts involving tourist rentals, due to the City Attorney's failure to offer properly admissible evidence of these contempts. (See appendix to Petition for Certiorari at pp. 10a-12a) The City now asserts this fortuity, resulting from its own procedural errors, as a ground for denying review. The City's position is without merit.

The record-keeping, posting, and inspection requirements, which Sparks violated, are strictly creatures of the Residential Hotel Ordinance. They are totally unrelated to the ordinary record-keeping and posting requirements imposed on all San Francisco hotels. The Certificate of Use, which the Residential Hotel Ordinance requires Sparks to post in his hotel lobby, recites the number of rooms in his hotel, which the City has designated as "residential" pursuant to the Residential Hotel Ordinance. This document bears no relation to the Permit of Occupancy which the City issues to all hotels. Similarly, the Daily Logs and Weekly Reports, which Sparks failed to prepare, are special forms required only of residential hotels, on which the hotel owner must specify which rooms have been rented on a residential basis and which rooms on a tourist basis. These documents bear no relation to the ordinary guest register, which must be maintained by all San Francisco hotel operators.

As the Residential Hotel Ordinance frankly states (San Francisco Administrative Code § 41.11), the only purpose of the special record-keeping, posting, and inspection requirements, is to enable the Bureau of Building Inspection to "determine if [the] owner or operator has complied" with the

Residential Hotel Ordinance. Thus, the record-keeping and posting requirements which Sparks violated, are an integral part of the facially unconstitutional ordinance. This Court should accordingly grant review, and strike down the Residential Hotel Ordinance in its entirety.[2]

IV. THE FACTUAL ISSUES RAISED BY THE BRIEF IN OPPOSITION ARE IRRELEVANT TO THIS FACIAL CONSTITUTIONAL CHALLENGE

The City burdens its Brief in Opposition with a wealth of detail concerning the purchase and operation of Sparks' hotel. It argues that Sparks has not been deprived of all economically viable use of his property, or has not exhausted his administrative remedies. Such arguments are immaterial here, where Sparks contends that the ordinance is unconstitutional, not merely as applied to himself, but on its face.

The City's further protestations, that the Residential Hotel Ordinance does not effect a physical invasion of Sparks' property, and serves a legitimate public purpose, likewise misconstrue the nature of Sparks' constitutional challenge. Sparks does not contend that the Residential Hotel Ordinance effects a physical invasion of his property. [3] Nor does he

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[2] As the City itself concedes, all of Sparks' contempt convictions involved violations of the Residential Hotel Ordinance, and the on-going state court litigation concerning Sparks' hotel's zoning status, is irrelevant to the Petition for Certiorari.

[3] The New York Court of Appeals' decision in *Seawall Associates v. City* of New York, 542 N.E. 2d 1059 (1989), does not turn upon the physical invasion effected by the New York City law. On the contrary, the *Seawall* court expressly stated: "Even if Local Law 9 were not held to effect a physical taking, it would still be invalid as a regulatory taking." (*Seawall*, *supra*, 542 N.E.2d at 1065.)

doubt that providing low-income housing constitutes a legitimate public purpose. Rather, Sparks urges that the San Francisco Residential Hotel Ordinance is facially violative of the United States Constitution, because it endeavors to achieve a legitimate and constitutional end through an illegitimate and unconstitutional means.

Justice Holmes stated the point as succinctly as might be desired, speaking for this Court in *Pennsylvania Coal Company v. Mahone*, 260 U.S. 393, 415 (1922):

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without just compensation...when this seemingly absolute prohibition is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until private property disappears. But that cannot be accomplished in this way under the constitution of the United States.

This Court may take judicial notice, that local governments today are often caught between growing demands for costly social services, and a voting constituency hostile to increased taxation. Human nature being what it is, local politicians will attempt to resolve these conflicts by a shorter cut than the Constitution permits, unless this Court establishes firm constitutional limits.

In the case at bar, the San Francisco Board of Supervisors has taken an unconstitutional shortcut by enacting an ordinance which "forces some people alone to bear a public burden which in all fairness and justice, should be borne by the public as a whole." (Quoting, *Armstrong v. United States*, 364 U.S. 40, 49 (1950)) By striking down San Francisco's Residential Hotel

Ordinance, this Court would place both local governments and the lower courts on notice, that even the most admirable social programs must be funded by the constitutionally authorized method: to wit, the power to tax and spend.[4]

CONCLUSION

Adam Sparks' Petition for Certiorari raises timely constitutional questions of the highest order. It should be granted forthwith.

Respectfully submitted,

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[4]The City's argument concerning Sparks' right to jury trial does not demand lengthy rebuttal. Suffice it to say that the handful of cases cited in the Brief in Opposition, fail to resolve the multiple conflicts between the Circuits and conflicts in United States Supreme Court precedent, described in the Petition for Certiorari.